Supreme Court, U.S.
FILED

No. 93-

94 633 AUG 29 1994

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

PHYLLIS BELL,

Petitioner,

v

SUPERMARKETS GENERAL CORPORATION, t/a PATHMARK

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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PETITION FOR WRIT OF CERTIORARI

Phyllis Bell
507 C2 Knightsbridge Court
Bensalem, Pa. 19020
(215) 638-1705
Petitioner

QUESTIONS PRESENTED

1. Whether it is insubordination for a licensed pharmacist to refuse to fill a prescription if ordered to by a supervisor, or is the decision whether to fill a prescription a right and duty given to a licensed pharmacist in the state of Penna., according to Penna. state statute(the Penna. Pharmacy Act)?

2. Whether it is insubordination for a licensed pharmacist in the United Pharmacists Guild (union for pharmacist's at pathmark), to refuse to fill a prescription if ordered to by a supervisor, or is the decision to fill a prescription a matter of judgment according to the Collective Bargaining Agreement of the United Pharmacists Guild?

3. Whether the District Court for the Eastern District of Penna., is correct in it's summary judgment order, based upon:

a. issue preclusion: if the issue of the discriminatory nature of my termination for

insubordination was raised, but never litigated?

and

b. claim preclusion: whether this aspect of the summary judgment decision is a violation of my right of equal protection and due process?

PARTIES TO THE PROCEEDING

Brian Davis, former supervising pharmacist at pathmark.

Rick McGinley, personnel director,pathmark

Hal Crane, litigation attorney, pathmark

Michael Kraemer, attorney for pathmark(of White and Williams)

Joseph Garvey, U.C. Referee, the Commonwealth of Penna.

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TABLE OF AUTHORITIES

1. Pa. Code,Title 49, Section 27.18(c)
State Statutes

2. Pa. Code, Title 49,Scetion 5.12,State
Statutes.

3. Collective Bargaining Agreement for the
United Pharmacists Guild.

OPINIONS BELOW

1. On 1/29/92, Joseph Garvey, a unemployment referee for the Commonwealth of Pa., upheld my termination for insubordination, based upon Section 402(e) of the state unemployment compensation law, appeal no. 92-1-C-15.

2. On 2/4/93, the Commonwealth Court of Pa. on appeal no. 1315CD, affirmed the decision of the U.C. Referee, and the U.C. Board, also citing section 402(e) of the Pa. U.C. Law.

3. on 3/27/92, the EEOC found no evidence of discrimination on charge no. 170920226.

4. An Arbitration hearing was held on 3/5/92. On 5/12/92 the arbitrator concluded that I unreasonably failed to fill a prescription in a timely fashion, without a sufficiently good reason,but he reduced the termination to a suspension and awarded no back pay.

5. The U.S. District Court decided in favor of summary judgment on civil action no.92-4558, entered 10/21/93.

6. The U.S. Court of Appeals for the Third Circuit on 5/9/94, affirmed the decision of the

U.S. District Court, did not give an opinion, case no. 93-2093, dated 5/9/94.

7. On 6/1/94, the U.S. Court of Appeals for the Third Circuit, denied a petition for rehearing.

JURISDICTION

On 6/1/94, The Third Circuit Court denied a petition for rehearing. The Supreme Court has the jurisdiction to review the decision by writ of certiorari, according to Rule 10.1(a) and (b).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. U.S. Constitution, 14th Amendment: " No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the U.S., nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

2. Federal Labor Law: Collective Bargaining Agreement of the United Pharmacists Guild: page 10,Section j:" Decisions concerning ethical or professional aspects of pharmacy shall remain solely within the judgment of the pharm-

acist on duty as it refers to immediate decisions in connection with the job".

3. Pa. Code Title 49, Section 5.12, State Statutes: " The Board shall have the power to refuse, revoke or suspend the license of any pharmacist upon proof satisfactory to it that the pharmacist.....(section 12): Is guilty of incompetence, gross negligence or other malpractice or the departure from, or failure to conform to, the standards of acceptable and prevailing pharmacy practice, in which case actual injury need not be established".

STATEMENT OF THE CASE

I am filing this petition pro se because none of the many lawyers I consulted would take my case. Most would not because the legal complexities involved would make it too time consuming for them to pursue. In addition, the amount of money involved is not substantial, although it is a lot to me.

It is not however a financial issue. I am filing this petition to seek a legal remedy for the violation of my civil, as well as professional rights by pathmark.

I have been a licensed pharmacist in the state of Penna. for 17 years. I am also licensed in New York and New Jersey.

In Oct. of 1987 I began working for pathmark, as a staff pharmacist. Virtually from the moment I entered the doors, I encountered employment difficulites. I attempted to resolve those difficulties, first thru the United Pharmacists Guild(union for pharmacist's at pathmark), then thru store management. My efforts were futile. I finally filed a claim with the Human Relations Commission. All of the difficulties I encountered are typified by the events of Oct.30 and 31,1991.

A. Termination

On Oct. 30,1991, I refused to fill a prescription as ordered to by my supervisor. I refused because he wanted me to fill the prescription in a way that was not pharmaceutically correct (to fill it with an ingredient other than what the doctor requested). The next day, he again demanded that I fill it. I again refused. He then said, "do it and do it now Miss Professional, or you are going to be insubordinate". He stated that if I did not do it, I would be

fired, and there would be nothing that I could do. I refused.

He left the pharmacy dept. to get the store manager, T.J. Frances, who asked me to come to his office. I requested, that either my lawyer or a union representative be present during our conversation. Mr. Frances stated, that if I would not talk to him without a union representative, to leave the premises. I returned to the pharmacy dept. to call a union representative. Mr. Frances followed me. He said, that I could not use the telephone, to leave. I did.

At a subsequent meeting on Nov. 5,1991, I was terminated for insubordination by the personnel director,Rick McGinley.
Needless to say, the experience was very humiliating. But, I am not asking the court to intervene on my behalf, because of a problem of a personal nature. Quite the contrary. I am asking the court to consider the legality of the events of Oct.30,31, and Nov. 5,1991 only.

Since Nov. 5,1991, I have tried to have that decision reversed thru every legal avenue that I am aware of. The various agencies

and judicial bodies that I turned to for assistance, have further exasperated the problem. I am the victim, yet I am the one who has suffered both financially as well as emotionally as a result of this ordeal. The Supreme Court is my last hope to have this matter "judged", only on the legal merits involved. I beg the court to consider my petition.

B. LEGAL ACTION TAKEN FOLLOWING TERMINATION

On the advice of my attorney at the time, I filed for unemployment compensation. She felt the state system would be the quickest way to have this case heard, in the event we had to go to court. She also advised me to file a claim with the EEOC, based upon harassment, retaliation, sex and race discrimination. In addition I filed a grievance with the union.

C. RESULTS OF LEGAL ACTIONS(STATE)

The unemployment was denied because of gross misconduct. I appealed to a U.C. referee (Joseph Garvey), who denied the appeal; citing rule 402(e) of the state unemployment laws(case no. 92-1-C-15,1/29/92). I appealed to the U.C. Board, who affirmed the decision. I finally appealed to the Commonwealth

Court. The court affirmed the decision of the U.C. Board and the referee, case no. 1316C.D. 1992.

The Commonwealth Court regarded my refusal to fill the prescription as a wanton and willful disregard of my employers rules, etc. The court stated that I should have filled the prescription, by doing so it would not have harmed the patient.

D RESULTS OF LEGAL STEPS (FEDERAL)

After the EEOC found no evidence of discrimination, I filed a pro se suit in federal district court, based upon my Title VII claims.

The court appointed William H. Brown, of Schnader, Harrison, Segal and Lewis to represent me.

The case was heard by a federal arbitration panel, who affirmed the decision.

Pathmark then filed a motion for summary judgment, which was granted by the district court, case no. 92-4558, 10/21/93.

I then filed a pro se appeal to the Third

Circuit Court. They affirmed the decision of the district court on 5/9/94, case no.93-2093. I then filed a pro se appeal for a petition for rehearing in banc; which was denied on 6/1/94.

REASONS FOR GRANTING THE WRIT

The Writ should be granted because all of the aforementioned agencies and judicial bodies made errors of law in deciding issues in this case. Other applicable laws were completely overlooked.

1. Omission of the Collective Bargaining Agreement

The first error of law was made by the U.C. referee. He stated at the hearing, that he did not want to hear anything about the union, and that he did not want to go into what the guild considers.

According to the states labor laws, there are exceptions to insubordination. One of the exceptions, is if you are a member of a union. The referee was therefore obligated to consider the collective bargaining agreement. On page 10, Section j of our agreement, it states

that the decision to fill a prescription is up to the judgment of the pharmacist. Therefore, under the terms of the agreement, my refusal to fill the prescription was not insubordination.

Unions are regulated by federal labor laws(which apply in all states). Consequently, this issue involves a conflict in the state vs the federal labor laws. The Supreme Court has the authority according to Rule 10.1 (c), to resolve this issue.

2. Conflicting State Laws.

The Commonwealth Court concluded that my refusal was insubordination. I should have filled the prescription, by doing so the patient would not have been harmed. That decision is contrary to state statute(The Pharmacy Act). Section 5, part 12 of the act states that the board has the power to suspend or revoke the license of any pharmacist for departing from, or failure to conform to the standards of <u>acceptable</u> and <u>prevailing</u> pharmacy practice, in which case ACTUAL INJURY NEED NOT BE ESTABLISHED. That

standard is, and has always been to dispense the correct medication to the correct patient, period..... Not only, is it unethical to dispense a medication that you know is wrong, but it is also a violation of the Pharmacy Act as well; irregardless of whether it is injurious to a patient. The Supreme Court has the jurisdiction to decide this issue according to Rule 10.1(a).

3. The Effects of Medications

Very often the effects of medications are not realized for days, months or even years later.What if I am asked to dispense a medication that may not have any immediate ill effects, but could be dangerous over a period of time? What if the medication does not harm the patient, but causes a lot of discomfore? For the above mentioned reasons, and many more, a pharmacist must use his or her judgment in deciding to fill a prescription.

4. Liability

If I am forced to fill a prescription that is pharmaceutically incorrect, will my super-

visor be responsible, or will I be? If I am responsible, then how can I be forced to fill a prescription that I disagree with, yet am accountable for?

5. Undue Influence

I was instrumental in having this supervisor terminated from a previous employer, when I was his supervisor.He also made improper sexual advances toward me. Could this be his efforts to retaliate???? That is why each individual pharmacist if licensed and responsible, to prevent undue influence upon their dispensing. The Pharmacy Act, is not only a protection of a pharmacist professional rights, but also an important safety net for consumers.

6. Issue Preclusion:The District Court gave "full faith and credit" to the decision of the state court.

a. But, as I previously mentioned, the state courts decision contained many errors of law.

b.The District Court was also not correct regarding the issue preclusion element of my

case. The Title VII issues were raised at the U.C. referee hearing, but were never litigated. The U.C. Board, and the Commonwealth Court, also never considered the Title VII issues. Therefore, I should not be barred from having those issues litigated at the federal level. According to Rule 10.1(a), the Supreme Court has the authority to review that decision.

c. 14th Amendment:

Because my Title VII issues were never considered, the District Court is denying me "due process", as well as "equal protection", by not allowing me to have those issues litigated. The Supreme Court as the authority to review that decision according to Rule 10.1 (a).

7. Claim Preclusion:

By not allowing me to bring forth any claims that were not previously mentioned, the District Court may also be violating my 14th Amendment rights to due process and equal protection.

In addition, my Title VII claims may not have been able to be addressed at the time of the U.C. referee hearing, because the EEOC had not yet made it's determination.

CONCLUSION

I am not a lawyer, but have attempted in this petition to express as concisely as I could the errors made in the various proceedings.

My efforts to have these errors clarified by the appropriate judicial bodies have thus far been futile. Every judicial body in which I have appealed these issues, have affirmed the initial incorrect decision by the U.C. referee. This seems to be like a "gentlemens agreement".

I have no idea if the legal issues in this case are significant enough for the highest court in the country to consider. But, if individual U.S. citizens cannot have their grievances addressed by the appropriate legal channels, then what is our recourse? If pathmark can hire a big law firm into manipulating the various agencies and judicial bodies into deciding that I have to do something, that I

know I don't have to do, then what can I do?

The various agencies and judical bodies are designed to uphold the laws of the various states, as well as this country. They are not designed to assist severel individual in a company in denying rights given to us by the various laws.

The laws do not guarantee that citizens will never be harassed or discriminated against at the workplace. But, we are guaranteed the right to have those grievances addressed in the appropriate forum. Can the Commonwealth Court and the District Court deny me that right?

Unions were formed to protect the rights of workers. The Pharmacy Act was designed not only to protect the professional rights of licensed pharmacist, but also to protect the health and safety of consumers as well.

It is not Mr. Garvey's (U.C. Referee) or Mr. McGinley's(personnel director) function to decide if these laws should be considered, they should be. If they can, unlike all of the other pharmacist at pathmark, deny me the

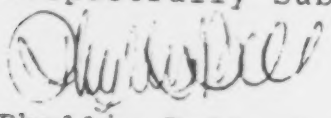
protection , given in our Collective Bargaining Agreement, as well as the professional rights under the Pharmacy Act, what should I do?

I realize the Court cannot be bothered with the personal concerns for citizens. These issues are not of a personal nature, these are legal issues.

Could they again attempt to force me to fill a prescription? Should I fill it, as long as it does not kill someone? If they do attempt to force me to do something unethical or illegal, in what forum should I have the grievances addressed?

I respectfully request the Court to consider this petition.

Respectfully Submitted,



Phyllis Bell, R.Ph.
petitioner.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 93-2093

Phyllis Bell

v.

Pathmark (supermarkets General Corp.)

SUR PETITION FOR REHEARING

Present:Sloviter,Chief Judge, Becker,Stapleton, Mansmann,Greenberg,Hutchinson,Scirica,Cowen, Nygaard, Alito,Roth and Lewis, Circuit Judges

The petition for rehearing filed by Appellant Phyllis Bell in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision asked for rehearing, and a Majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court.

D.K. Sloviter

Chief Judge

dated: June 1 1994

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 93-2093

PHYLLIS BELL,
Appellant

v.

PATHMARK,(SUPERMARKETS GENERAL CORP.)

On Appeal from the United States District Court for the Eastern District of Penna.

(D.C. No. 92-cv-04558)
District Judge: Hon. Steward Dalzell

Submitted Pursuant to Third Circuit LAR 34.1(a)

April 21,1994

Before: Sloviter, Chief Judge
Cowen and Lewis, Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED and ORDERED that the judgment of the district court entered October 21,1993 be and is hereby affirmed. Costs taxed against

appellant.

By the Court,

d.k. Sloviter

Chief Judge

Attest:

P. Douglas Siskk, Clerk

dated May 9- 1994

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

PHYLLIS BELL	:	CIVIL ACTION
	:	
v.	:	
	:	
SUPERMARKETS GENERAL CORPORATION t/a PATHMARK	:	No. 92-4558

MEMORANDUM

Dalzell, J. October 21,1993

Plaintiff Phyllis Bell filed this Title VII action against Supermarkets General Corp., transacting business as Pathmark, after Pathmark discharged her from employment at one of its pharmacies. According to Bell, her discharge was not only the result of sex and race discrimination, but was also in retaliation for her filing of three EQUAL EMPLOYMENT OPPORTUNITY COMMISSION(EEOC) claims against Pathmark.

Pathmark has filed a motion to dismiss Bell's complaint, contending that Bell's claims are barred by the doctrine of collateral estoppel, otherwise known as issue preclusion. Alternatively, pathmark argues that we must grant summary judgment on at least a portion of Bell's claims because they were not filed

within ninety days of the issuance of the EEOC Right-to-Sue letter addressing the very conduct about which Bell now complains.

For the following reasons, we find that Bell has failed to produce a factual record sufficient to defeat Pathmark's motion for summary judgment. Furthermore, we find that even if Bell had produced an adequate record, the doctrin of claim preclusion would bar her Titlve VII action.[1] We will therefore grant Pathmark's motion.

BACKGROUND

Pathmark hired Bell as a staff pharmacist in October of 1987. On July 25,1989, Bell filed a charge of discrimination with the EEOC alleging that Pathmark had discriminated against her both racially and sexually. First Charge of Discrimination, Exhibit A to Pathmark's motion for summary judgment(Pathmark's motion").

1. Because we will decide Pathmark's motion on these grounds, we will not address Pathmark's argument that Bell filed her complaint outside of the EEOC's ninety day window.

Neither Bell's charge nor the record in this case, however, sets forth the specific facts of the alleged discrimination which were the subject of that charge.

On January 18,1991, Pathmark transferred Bell from its pharmacy on City Line Ave. to its pharmacy on Grays Ferry Ave. in Philadelphia. It Claimed that the transfer was the result of "adverse customer complaints". Second Charge of Discrimination, Exhibit C to Pathmarks's motion. Bell responded with a second charge of discrimination that she filed with the EEOC in early February of 1991, alleging that the transfer was the result of further race and sex discrimination and that Pathmark orchestrated the transfer in retaliation for her filing of the previous EEOC charge.

In August of 1991, the EEOC issued a brief Determination in which it stated that the evidence obtained during the EEOC investigation did not establish that Pathmark had engaged in discrimination in violation of

Title VII prior to Bell's filing of her first charge.[2] First EEOC Determination, Exhibit B to Pathmark's motion. As is customary, the Commission went on to advise Bell that she had the right to file a private action in federal court withing ninety days of the Determination. She filed no such action within that time.

On October 31,1991, Pathmark discharged Bell from her position because she had been insubordinate and had used abusive language with her supervisor. Bell contends in a third EEOC charge that she filed on November 20,1992, however, that Pathmark discharged her in retaliation for her previous discrimination charges. Third Charge of Discrimination, Exhibit E to Pathmark's motion.

On March 27,1991, the EEOC issued a second Determination which addressed the claims in Bell's second and third charges of discrimination. See Second EEOC Determination, Exhibit D to Pathmark's motion. In the Determination, the Commission once

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2. This Determination did not address the claims set forth in Bell's second Charge of Discrimination.

again concluded that there was insufficient evidence of a Title VII violation for it to pursue Bell's claims, and it advised Bell that she could file a private action within ninety days.

After Bell's termination, her union, The United Pharmacists Guild, brought her discharge for arbitration pursuant to its collective bargaining agreement with Pathmark. An arbitration hearing was held on March 5,1992, and on May 12 of that year, the arbitrator issued an opinion in which he found that Bell had been discharged because she had "unreasonably failed to fill (a) prescription in a timely fashion, without a sufficiently good reason", and that she "may well have" used abusive language with her supervisor. Arbitrator's opinion at 9, Exhibit F to Pathmark's motion, The arbitrator also found however, that the confrontational behavior of Bell's supervisor "exacerbated the situation". In light of these findings, the arbitrator ultimately concluded that Pathmark's punishment of Bell had been harsher than was necessary and he directed that Pathmark reinstate Bell and convert her discharge into a

six month suspension without pay.

In the meantime, Bell had also filed a claim for unemployment compensation benefits with the Pennsylvania Bureau of Employment Security. The Bureau found that Bell was ineligible for benefits under Section 802(e)[3] of the Penna. Unemployment Compensation Law, because she had been discharged from Pathmark's employment for willful misconduct.[4] Bell appealed this decision to a referee who, after holding a hearing at which Bell was represented by counsel, concurred with the Bureau and denied Bell benefits for engaging in willful misconduct. Bell next appealed the referee's decision to the Board of Review, and the Board affirmed the referee's decision.

3.Section 802(e) provides in pertinent part that an employee is ineligible for unemployment compensation for any period...in which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work.... Pa. Cons,Stat. Ann. ...802(e)

4. The Penna. courts have defined "willful misconduct" as an act of wanton or willful disregard of the employer's rules, a disregard of the standards of behavior which the employer has the right to expect of this employee(sic), or negligence indicating an intentional disregard of the employer's interest or of the employees (sic) duties and obligation to the employer

Finally, Bell appealed to the Penna. Commonwealth Court and on February 4,1993, the Court issued an opinion affirming the Board's denial of benefits. See Commonwealth Court Opinion, Exhibit G to Pathmark's motion. The facts as the Court described them are that Bell was working at the pharmacy on October 30,1991, when her supervisor, Brian Davis, directed her to fill a prescription containing the notation "WSB". Id at 1. Although Bell did not know the meaning of "WSB", Davis instructed her that the abbreviation stood for water soluble base and that aquafore was an appropriate substitute. Id at 2. Nevertheless, Bell, having no personal knowledge of the meaning of "WSB" or its appropriate substitutes, refused to fill the prescription. Id. The next morning, Davis called the prescribing physician who informed Davis that aquafore was an acceptable substitute. Id. When Bell arrived at work, Davis ordered Bell to fill the prescription using aquaphor. Bell once again refused and used "abusive and profane language".

Having confirmed these findings of fact, the Court agreed with the referee's and Boards findings that Bell's conduct leading to her discharge constituted insubordination that amounted to willful misconduct. The Court therefore affirmed the denial of benefits.

While these state proceedings were pending Bell on August 4,1992, filed the instant Title VII action on a pro se basis. We promptly appointed counsel to represent her. The case proceeded to arbitration and the arbitrator entered judgment in favor or Pathmark. Bell requested a trial de novo and Pathmark responded with its motion for summary judgment.

Discussion

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions of file, together with the affidavits, if any, show that there is not genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed.R.Civ.P56(c). To defeat judgment, the non-moving party "may not rest upon the mere allegations or denials of its pleading, but its response, by affidavits

or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial". Fed.R.Civ,P, 56(e).

Specifically, the non-moving party must produce evidence such that a reasonable juror would rule, the court should apply the substantive evidentiary standary-- in the instance, a preponderance of the evidence-- that the fact finder would be requited to use at trial. Id at 252. A mere scintilla of evidence will not require the court to send the question to the fact-finder. Id at 251(citing Improvement Co. v Munson,14 Wall, 442,448(1872).

a. Bell's Title VII Claims

To establish a prima facie case of race or sex discrimination under Title VII, Bell must show that (1) she belongs to a protected class, (2), she is qualified for the position from which she was discharged, and (3) other employees were treated more favorably. Josey v John R. Hollingsworth Corp., 996 F.2d 632,638 (3rd Cir, 1993). In order to establish a prima facie case of retaliatory discharge under Title VII, Bell must prove that (1) she engaged in protected activity, (2), she was discharged

after or contemporaneous with that activity and (3) there was a casual link between the protected activity and discharge. Robinson v Southeastern Penna. Transp. Auth.,Red Arrow Div., 982,F 2d 892, 895 n.1 (3rd Cir. 1993).

With regard to Bell's claims of sex and race discrimination, it is undisputed that Bell satisfies the first element of her prima facie case because she is a member of two protected lcasses, blacks and women. We also presume that she is qualified for the position from which she was discharged because she held that position for four years. To make out a case of sex and race discrimination, however, Bell must also produce evidence such that a reasonable jury could find that other employees were treated more favorably. See Anderson, supra, 477,US. at 248.

Bell claims that Davis sexually harassed her prior to her discharge by making sexual advances and engaging her in explicit sexual conversations. Complaint at 5; Bell's response to Pathmark's motion(Bell's response") at 2. Bell further contends that Davis became angry with Bell when

she resisted his advances and his anger led him to treat her differently than he treated other employees. Complaint at 5, Bell's response at 3. Most importantly, Bell claims that other Caucasian and male employees had both disobeyed their supervisors, as Bell did when when she refused to fill the prescription in October of 1991, and yet Pathmark had not disciplined them. Id. at 3, see also Complaint at 2,8-9.

Aside from these bald allegations, however, Bell has put forth no evidence in support of her assertion that other employees were treated differently than she. In fact, Bell attached only two exhibits to her response to Pathmark's motion for summary judgment. The first of these exhibits is an affidavit from Bell that addresses only the timing of her receipt of the EEOC's first Letter of Dertermination.[5] The second exhibit is a copy of Bell's return receipt card from the delivery of the same Determination, Neither provides us with any basis on which to find that there is a genuine issue of material fact as to whether other employees were treated more favorably than Bell.

Similarly, the exhibits attached to Bell's complaint- a letter from Bell's union to Pathmark, a letter from Bell's lawyer for the arbitration to the arbitrator, the abbitrators's opinion, Pathmark's employment manual and the United Pharmacist's Guild's contract with Pathmark- provide no evidence suggesting that Pathmark treated

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5. The full text of Bell's affidavit states:
I. Phyllis Bell, hereby certify the following:
1. I am the plaintiff in the above-captioned case.

2. I received from the EEOC a return receipt card, signed by me, dated 5/8/92, which return receipt was for the letter of determination received from the EEOC(a copy of which is attached hereto as Exhibit A).

3. I did in fact receive the decision of the EEOC on 5/8/92.

4. This return receipt card was for the same decision rendered by the EEOC on Charge nos. 170910531 and 170920226 dated 5/27/92, showing the article number as P 631 350 347, and attached to the defendant's motion for summary judgment at Exhibit D.

other employees differently than it treated Bell. Because Bell bears the burden of proving all elements of a prima facie case of Title VII discrimination, see Josey, supra, 996 F 2d. at 637-38, her failure to submit any evidence of the third element in response to Pathmark's motion for summary judgment is fatal to her claims.

There are similar deficiencies with Bell's retaliation claim. AlthoughBell has established the first two elements of the prima facie case of retaliation(because it is undisputed that she engaged in protected activity when she filed her EEOC charges of discrimination and that Pathmark discharged her after, or comtemporaneous with, that activity), she has provided us with only unsupported allegations of a casual connection between the activity and the discharge. See Second Charge of Discrimination, Exhibit C to Pathmark's motion (" I believe... that I have been retaliated against... for the filing of the previous complaints of discrimination because... the persons who have been subjecting me to disciplinary action and who made the decision to transfer me were all involved in

the fact finding conference held for my first charge of discrimination."); Third Charge of Discrimination, Exhibit E to Pathmark's motion ("I believe I have been terminated in retaliation for filing previous charges of employment discrimination.") Without evidence of a casual link which creates a genuine issue of material fact as to whether such a link existed, we find that no "fairminded jury could return a verdict for plaintiff on the evidence presented". Anderson supra, 477 U.S. at 252. We will therefore grant Pathmark's motion for summary judgment.

b. Issue and Claim Preclusion

Even if we were to find that Bell has provided us with succifient evidence to allow her to take her Title VII claims to trial, we would still grant Pathmark's summary judgment motion because we hold that Bell's unemployment compensation proceeding, which the Commonwealth Court reviewed, precludes Bell's later federal claims against Pathmark.

28 U.S.C.§ 1738 requires that federal courts five "full faith and credit" to judgments of state courts, including judgments which have arisen out of state court review of state

administrative ageny decision. Edmundson v Borough of Kennett Square, No 91-2618, slip op. at 4 (3rd Cir. Aug 10,1993). This means that we must give a state court judgment the same preclusive effect in federal court as the judgment would receive in the courts of the state from which the judgment arose. See Nanavati v Burdette Tomlin Memorial Hospital, 857 F 2d 96 (3d Cir.) cert. denied 489 U.S. 1078, 109 S ct. 1528 (1988).

We must therefore consider the doctrines of issue and claim preclusion. Issue preclusion bars issues that have been adjudicated at the state level from being relitigated in federal court. Edmundson, supra, slip op. at 4. Claim preclusion, on the other hand, not only bars the relitigation of claims that have already been litigated, but also prohibits the relitigation of claims that could have been, but were not, raised in a earlier action. Id.

Here, the Commonwealth Court affirmed the Unemployment Compsnsation Board's finding that Bell was discharged because of willful misconduct. Issue Preclusion therefore prohibits us

from readdressing this issue. Bell, however, contends that we are not similarly precluded addressing her argument that Pathmark's charge of willful misconduct was simply a pretext for its discrimination because the Board and the Court never actually considered her discrimination and retaliation claims.[6]

It does not appear from the record that the Commonwealth Court every considered that Pathmark may have used the charge of willful misconduct as a pretext for discrimination or retaliation for the filing of an EEOC charge. Bell is therefore correct in stating that issue preclusion does not bar the litigation of these issues in federal court. In focusing on issue preclusion, however, Bell neglects the effect of claim preclusion on her action.

As we stated above, claim preclusion has a broader effect than issue preclusion in that it

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6. Under Title VII, after Bell has established all of the elements of the prima facie cases of discrimination and retaliation, the burden of proof shifts to Pathmark to articulate a "legitimat non-discriminatory reason" for Bell's discharge. Josey supra,996 F2d. at 638.The state court's finding of willful misconduct undoubtedly satisfies this burden. Therefore, in order for Bell to prevail in her Title VII action, she must establish by a preponderance of the evidence that the

can bar adjudication of Bell's Title VII action even if the claims underlying that action were not litigated in her unemployment compensation case. See Edmundson, supra, slip op. at 6-8. Because we find that Bell could have raised and litigated her claims of discrimination and retaliation in the state court proceedings, we conclude that claim preclusion bars the litigation of these claims in a federal Title VII action.

Under Penna. Law, the Commonwealth Court if prohibited from upholding the unemployment board's finding of willful misconduct "where the employer has applies different standard of behavior to different employees." Sommers v Unemployment Board of Review, 56 Pa. Commw. 275,424 A.2d 619, 621, (1981)(citing Woodson v Unemployment Compensation Board of Review, 461 Pa. 439,336 A2d.867 (1975). This is particularly true when an employer discriminates by requiring a different standard of behavior from black employees than it requires

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6."legitimate" reasons Pathmark proffered were not its true reasons but were a pretext for discrimination. Id.

from white workers. See Woodson, 461, Pa. 443-444, 336 A. 2d at 869; Palmer v Unemployment Compensation Board of Review, 50 Pa. Commw. 300, 412, A2d 917, 918 (1980). Because the Commonwealth Court is subject to these restriction, it is obligated to hear a claimant's arguments regarding discriminatory treatment. Therefore,Bell could and should have raised her claims of sex and race discrimination with the Commonwealth Court. Althoughshe chose not to do so, claim preclusion mandates that we treat those claims as adjudicated and refuse to hear further argument on them.

The same holds true for Bell's retaliation claim. Although Penna. law does not explicitly state that the Commonwealth Court may not find willful misconduct if a claimants's employer has discharged the claimant in retaliation for filing an EEOC claim of discrimination, Penna. appellate decisions make clear that the Court will scrutinize and employer's motive for firing an employee and will strike down a finding of willful misconduct if the employer was motivated by an improper purpose. See Woodson,supra,461 Pa. 439, 336 A 2d. 867; Palmer, supra, 50 Pa. Commw.

300, 412 A 2d 917.

Moreover, because Pennsylvania unemployment law favors the interests of claimants in that it (a) puts the burden on the employer to prove willful misconduct, Drs. William & James Katsur & Assocs. v Unemployment Compensation Board of Review, 97 Pa. Commw 332,334 ,509 A 2d 926,927 (1986), (b) presumes that the unemployed worker is eligible for benefits, Penn Hills School Dist. v Unemployment Compensation Board of Review, 496 Pa. 620, 625, 437 A 2d. 1213, 1216 (1981), and (c) directs the courts to interpret the eligibility sections of the law liberally to provide the maximum amount of benefits allowable under the statute, PenFlex, supra, 506 at 286, 485 A 2d. at 365, we must presume that the Commonwealth Court also has the competence to adjudicate and employee's claim that his or her discharge was in retaliation for lawful and protected activity. We therefore believe that Bell could have raised her claim or retaliation in the compensation case, and because she did not, she is precluded from raising such claims now in federal court.

For the foregoing reasons, we will grant Pathmark's motion for summary judgment. An appropriate Order follows.[7]

7. Although we have ruled against his client, we wish to express our gratitude to William H. Brown, III Esquire, who with characteristic vigor has represented Bell on a pro bono basis in the best tradition of the bar.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PHYLLIS BELL	:	CIVIL ACTION
	;	
v	;	
	:	
Supermarkets General Corp. ,t/a Pathmark	:	No. 92-4558

Order and Judgment

AND NOW, this 21st day of October, 1993, upon consideration of defendant's motion for summary judgment, plaintiff's response thereto, and defendant's reply, and for the reasons stated in the foregoing memorandum, it is hereby ORDERED that defendant's motion is GRANTED and JUDGMENT IS ENTERED in favor of defendant and against plaintiff.

BY THE COURT:

_____

Stewart Dalzell, J.

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

Phyllis Bell	:	
	:	
v	:	Civil Action No.92-4558
	:	
	:	
Supermarkets General Corp. T/A Pathmark	:	

MEMORANDUM OF LAW IN
RESPONSE TO DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

In a timely fashion, plaintiff presents a Title VII claim to this court and requests a trial de novo . Plaintiff presents new and triable issues and facts concerning defendant's discriminatory motive for discharging her from employment. Specifically, plaintiff raises three unlitigated issues. First, plaintiff claims disparate treatment by defendant for the same conduct committed by similarly situated white employees. See Civil Rights Act of 1964 § 701 et seq., 42 U.S.C.A. § 2000e et seq. Second, she claims gender discrimination as a basis for her dismissal, namely, that her rejection of her supervisor's sexual advances prompted

her discharge. See id. Third, she shows that she was discharged in retaliation for filing a complaint with the Equal Employment Opportunity Commission. See id at 42 U.S.C.A. §2000 e-3.

STATEMENT OF FACTS

In October, 1987 plaintiff began her employment as staff pharmacist for Pathmark (Supermarkets General Corp.) in Bristol, Pa. In this position, she worked with two white females Ms. O'Toole and Ms. Bannon, who, on numerous occasions, acted contrary to her instruction and those of her supervisor, Mr. Keenan. Specifically, they used inappropriate and insulting language with Mr. Keenan. Additionally, Ms. Bannon refused to end personal phone call during business hours, as well as refused to perform duties required of her by the plaintiff. Despite plaintiff's request for disciplinary action to be taken against them, Mr. Keenan refused to discipline them for their gross insubordination (Complaint, p. 2).

On January 18,1991, over plaintiff's objections, Pathmark transferred plaintiff to its location at Grays Ferry Avenue. Soon after her arrival, Mr. Davis, plaintiff's supervisor began sexually harassing her. Specifically, he made sexual advances toward her and frequently engaged her in embarassingly explicit, sexual conversations. He also encouraged and arranged for a customer to approach her for sexual relations (Complaint p. 5). These incidents greatly offended plaintiff, and she directly confronted Mr. Davis about his sexual harassment. Additionally, she filed an employment discrimination charge with the EEOC on February 2,1991.
Her difficulties with Mr. Davis led to his antagonistic reaction toward her on October 31, 1991. The day before, plaintiff disagreed with Mr. Davis about the appropriate ingredient for a prescription. Because she did not want to mix the wrong medication, she did not fill the prescription. Both her collective bargaining agreement and the Pharmacy Act enabled and required her not to fill the prescription which she believes to be incorrect. In fact, the Pharmacy

Act provides that the use of the wrong ingredients may be a ground to revoke or suspend a pharmacist's license. However, the following day, Mr. Davis reproached her for not filling the prescription. Ms. Bell refused to fill the prescription. Subsequently plaintiff was discharged for not following instruction and acting insubordinate.

The fact that employees have disobeyed supervisors' instructions and have used abusive language toward their supervisors without incurring discipline evidences defendant's motive, other than plaintiff's conduct, for dismissing plaintiff. Plaintiff complains that she was discharged because of the gender and race and in retaliation for having filed a prior charge with the EEOC.

Accordingly, plaintiff filed a complaint with the EEOC on February 2,1991 and on November 20,1991. (See exhibits C and E of defendant's motion for summary judgment.) Although dated March 27,1992, the EEOC letter of determination did not reach plaintiff until May 8,1992. A copy of the post office's receipt showing the

date when the letter was delivered is attached to plaintiff's affidavit as Exhibit A. Additionally, plaintiff filed a claim for unemployment compensation benefits with the Bureau of Employment Security. The referee denied her benefits, and this decision was ultimately affirmed by the Commonwealth Court of Penna. However, in its review, the Court examined only the issue of whether plaintiff's behavior constituted willfull misconduct. A copy of the Commonwealth Court's decision is attached as Exhibit G of the defendant's motion for summary judgment. (Exhibit G, p.3). The issues of retaliatory discharge, sexual discrimination and disparate ~~impact~~ based on race were not litigated.

Similarly, when plaintiff's union, the United Pharmacists Guild, brought plaintiff's discharge for arbitration, only plaintiff's conduct was presented as the issues for review. The union did not raise the issues related to defendant's discriminatory motive for dismissing plaintiff.

It is the issues of retaliatory discharge, sexual discrimination and disparate treatment

based on her race, which are the gravamen of the plaintiff's complaints as outlined in her complaint filed with this Court on August 4,1992. The only forum in which the plaintiff has had an opportunity to litigate these issues is the United States District Court for the Eastern District of Pennsylvania.

ARGUMENT

A. Plaintiff's Claims Concerning Defendant's Conduct Was Timely Filed.

Plaintiff filed a charge on February 2,1991, being Charge No.1709 10531, alleging race and sex discrimination, as well as retaliation for having filed a prior EEOC charge.(See defendants's Exhibit "C" attached to the motion for summary judgment.) This charge alleged that plaintiff filed a charge of discrimination on July 25,1989 in which she complained about the reprimands and threats by her supervisor, the pharmacy manager, based on her sex and her race. She also alleged that attending the fact-finding conference were Rick McGinley, the respondent's personnel director, Michael Keenan, her supervisor,

and Rick Weingarten, the pharmacy director. She also alleged that from the time of the fact-finding conference on October 25,1989, until the date of her filing, she had been the subject of disciplinary actions, and was advised that she was being transferred to the Grays Ferry store. She goes on to allege that she believed she was being retaliated against for having filed a charge of discrimination. She further alleged that white and male pharmacist were not treated the same way.

On November 20.1991, plaintiff filed a charge of discrimination with the EEOC, being charge No. 170920226, which charge alleged that she was discharged in retaliation for her having filed previous charges of discrimination, It is the subject of these two charges, namely Charge Nos. 170910531 and 170920226, which form the basis of the complaint filed in the United States District Court on August 4,1992. A letter of determination was issued on Charge No. 170910531 and Charge No. 170920226 dated March 27,1992. (See defendant's Exhibit D to its motion for summary judgment.) Attached to this letter of

determination is a receipt for certified mail for document P 631 350 347. This receipt lists letters of determination for charge Nos 170910531 and 170920226. While the letter of determination was dated March 27,1992, it was not received by the plaintiff until May 8,1992(See plaintiff's affidavit, Exhibit A. It is clear from allof the evidence that the letter of determination, while dated March 27,1992, was not actually received until May 8,1992, and therefore the complaint which was filed in the instant action was timely filed. Moreover, the complaints as set forth in the plaintiff's complaint filed in this matter, covers the period July 25,1989 through November 20,1991. Further, her allegations of race, sexual harassment and retaliation all are properly before the Court as set forth in her Charge Nos. 170910531 and 170920226.

Plaintiff does not contest the fact that no lawsuit was instituted on her Charge no.170890876, dated July 25,1989. Howevere, it is clear from the subsequent charges that the violations of which she complains are continuing violations,

especially as it relates to Michael Keenan of whom she complained both in her charge of discrimination dated July 25,1989, as well as in her charge of discrimination dated February 2,1991.

For the foregoing reasons, defendant is not entitled to summary judgment on the claims in the complaint dealing with the time period October, 1987 to July 25,1989, since it was plaintiff's supervisor, the pharmacy manager, that she had complained about in her charge of July 25,1989 , as well as her charge dated February 2,1991.

B. Plaintiff shows sufficient evidence to create a genuine issue of employers's discriminatory intent.

According to Butler v Elwyn Inst., 765 F. Supp. 243,246 (E.D. Pa. 1991), summary judgment is appropriate only when the defendant can show that "the plaintiff will be unable to introduce the direct evidence of the purpose to discriminate or indirect evidence by showing that the proffered reason is subject to factual dispute." (citing Hankins v Temple, 829 F 2d 437,440-41 (3d Cir. 1987). Because plaintiff presents evidence showing discriminatory intent as

motivation for her discharge, defendant fails to carry its burden necessary for summary judgment.

As in Butler, plaintiff establishes a prima facie case of disparate treatment. She meets the three requisite elements to assert a disparate treatment claim. First, as a black person, she is a member of a protected class. Second, she has the qualifications necessary for her position. Third, others who are not in her protected class, namely white employees, were treated more favorably. See Butler, 765 F. Supp, at 246.

Additionally, plaintiff sufficiently raises the issues of gender discrimination and retaliatory discharge. In particular, plaintiff shows that her supervisor, Mr. Davis, made sexual advances toward her. Her explicit rejections of these efforts created tension in her working relationship with her supervisor. His resentment toward her culminated in his exchange with her on October 31,1991, and her subsequent discharge. Furthermore, plaintiff showed that defendant

discharged her in retaliation for filing a complaint with the EEOC on February 2,1991.

Nowhere in the decision of the Commonwealth Court is discrimination, Sexual Harassment, or retaliation even mentioned. Clearly the plaintiff's complaint that white employees were not disciplined for cursing out their supervisor was in no way addressed during the unemployment compensation hearing, nor by the Commonwealth Court in reviewing the referee's decision. Retaliation, Sexual discrimination, disparate impact based on race never were addressed during the proceedings before the unemployment compensation referee or by the Commonwealth Court.

The referee's decision outlines both the position of the company as well as the position of the union. No where in either of these two positions are the issues of sex discrimination, race discrimination, or retaliation for having filed an EEOC charge even mentioned. Indeed, the referee, in his opinion, while discussing the position of the union, indicates that the union's position was that this was a "professional dispute" relative to both how and whether

to fill a prescription." While the opinion of the referee does reflect that counsel for the union argued that on other occasions Brian Davis and others have left prescriptions overnight to be filled the next morning, nowhere does he indicate that counsel for the union argued that other employees had in fact cursed out their supervisors and were not disciplined, nor is there any mention of the fact (as alleged by the plaintiff) that white employees who where insubordinate were not disciplined, nor as she allowed to discipline the white employees reporting to her who were insubordinate.

The discussion fo the arbitrator, while going into great detail concerning the events leading up to the plaintiff's discharge, never once mentioned the words discrimination, race discrimination, sex discrimination, or retaliation. While the behavior of the plaintiff is discussed in detail, no mention is made of her allegation in the complaint before this Court, that her discharge was in retaliation for having filed a prior EEOC Complaint. Indeed, in neither the

Commonwealth Court's decision, nor the arbitrator's decision, is there any mention of the fact that the plaintiff had in fact filed charges with the EEOC. As a result, the arbitrator judged only plaintiff's conduct, determining whether she behaved in a fashion that warranted discharge. A copy of the opinion and award is attached to the defendant's motion for summary judgment as Exhibit "F".

C. The Federal Court has Plenary Review of Title VII claims, and Plaintiff Properly Exercises Her Right to A De Novo Trial of Her Title VII Claims.

Plaintiff received the EEOC Right to Sue Notice on May 8, 1992. Within ninety (90) days, on August 4,1992, she timely filed a Title VII claim before this court. Accordingly, she properly invokes her right to a trial de novo of her Title VII claim. See Chandler v Roudebush 425 U.S. 840, 844,852 (1976); Univ. of Tenn v Elliott, 478 U.S. 788, 793 (1986); Roth v Koppers Indus., Inc, 993 F 2d 1058 (3d Cir.1993).

This Court has plenary review of plaintiff's Title VII claim, despite a prior determination by the EEOC. See Chandler,425 U.S. 840,845 (1976); Kremer v Chemical Construction Corp., 456 U.S. 461,474 (1981); Alexander v Gardner-Denver Co.,

415 U.S. 36,45 (1974). In fact, according to Kremer, Congress authorized and required the federal court to review Title VII claims de novo so that employers and employees may not be subject solely to the potential bias of the EEOC. Congress noted that the EEOC, being a political entity, may be partisan in its judgment. See Chandler, 425 U.S. at 851 (discussing Senator Dominick's comments in the Senate Report 85). For this reason, Congress deliberatly denied the EEOC adjudicatory and enforcement authority.

On the other hand, the federal court is given the authority, and is required, to exercise plenary review of Title VII claims, in order to provide parties to a Title VII suit a non-partisan forum to present their case. See Kremer, 456 U.S. at 474. This, the EEOC determination does not preclude a plaintiff's trial on the merits before this Court.

D. Plaintiff Raises New Issues and FactsThat Have Not Been Previously Litigated.

1. The arbitrator's decision has no preclusive effect on plaintiff's claims before this Court, because of its inability to address discrimination claims and its focus on plaintiff's conduct, rather than defendant's discriminatory motive.

The arbitrator's review of plaintiff's discharge

should have no bearing on her trial on the merits in this Court. See Exhibit F of defendant's motion for summary judgment for arbitrator's determination. The United Pharmacists Guild only raised plaintiff's conduct as the sole issue for the arbitrator's resolution. Defendant's real motive for discharging plaintiff was not presented as an issue. Thus, the arbitrator did not consider whether defendant's reason for discharging plaintiff was merely pretext for a discriminatory intent. Specifically, then arbitrator examined neither plaintiff's claim that her supervisor discharged her because she refused his sexual advances, nor her claim that she was dismissed in retaliation for filing an EEOC complaint. Additionally, the arbitrator did not consider the question of disparate treatment based on race.

Furthermore, the arbitrator lacked the ability or the authority to properly address employment discrimination claims.

The seminal case of Alexander v Gardner-Denver Co.,415 U.S. 36 (1974) held that decisions by

the grievance arbitrators in no way impact upon a plaintiff's right to pursue a Title VII claim before the federal court. The court discussed the vast differences, in function and power, between the arbitration machinery and the court, noting that "the choice of forums inevitably affects the scope of the substantive right to be vindicated." See Alexander, 415 U.S. at 56 (citation omitted). As the court explained, the function of the arbitrator is merely to settle grievances according to the dictates of the collective- bargaining agreement.

Moreover, the arbitrator's authority to broker a settlement is strictly circumscribed by the terms of the collective- bargaining contract. The arbitrator lacks the authority to invoke any laws that conflict with the agreement. Furthermore, the fact finding in arbitration cannot compare with judicial fact finding. Additionally, as the Supreme Court in McDonald v West Branch, 466 U.S. 284, 290 (1984) discussed, arbitrators' "expertise pertains primarily to the law of the shop, not the law of the land." The limitations of arbitration

function, authority,factfinding, and expertise, according to the Supreme Court, makes "arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts." See Alexander, 415 U.S. at 58.

Because the arbitrator did not address and lacked the ability to address plaintiff's employment discrimination claims,plaintiff must be afforded the opportunity to litigate her Title VII claim. Defendant misapprehends Service Employees Int'l Union Local 36 v City Cleaning Co., Inc. ,982 F 2d 89 (3rd Cir. 1992) in asserting that plaintiff's failure to appeal the arbitration decision collaterally estops her from bringing a Title VII claim before this Court. Service Employees barred defenses raised during a proceeding to confirm an arbitration award, not an unlitigated Title VII claim before the federal court.

2. A decision by the Unemployment Compensation Board that has been affirmed by the Commonwealth Court of Penna. should not collaterally estop plaintiff's claims this Court, because the issues examined differ from those to be addressed.

Issues that have not been discussed by an

administrative agency, and, thus, not reviewed by the state court, do not collaterally estop litigation of those issues before the federal court. See Kelley v TYK Refractories Co., 860 F 2d 1188(3rd Cir. 1988) Title 28 U.S.C. § 1738 requires federal courts to give the same full faith and credit to state court judgements as would be given by the State's own courts. Under Penna. law collateral estoppel applies only when the following conditions are met:

> 1. the issue decided in the prior adjudication was identical with the one presented in the later action, 2. there was a final judgment on the merits, 3. the party against whom the plea is asserted was a party or in privity with a party to the prior adjudication, and 4. the party against whom it is asserted has had a full and fair opportunity to litigate the issue in question in a prior action.

Id. at 1194 (citation omitted, emphasis added). Although the parties to this Title VII claim are the same, plaintiff has not had the opportunity to litigate the issues related to defendant's covert discrimination.

In Kelley, the court held that under Penna. law, the Unemployment Compensation Board's decision which was affirmed by the Penna. Supreme Court did not collaterally estop a § 1981 racial

discrimination claim. The court based its decision on the finding that the Board, and ultimately the Penna. Supreme Court, has not examined the discrimination issue that was before the federal court and that, as a result, the plaintiff had not had an opportunity to litigate the matter.

Similarly, the Butler court held that plaintiff's disparate treatment and impact claims did not preclude her Title VII claim before the federal court. In reaching its decision, the court found that the Penna. Unemployment Compensation Board of Review did not examine whether defendant's reason for its employment practice was "pretext for unlawful employment discrimination." See Butler 765 F. Supp. at 251.

Likewise, plaintiff's gender and race discrimination claims were not addressed by the Board, and,thus, not ultimately reviewed by the Commonwealth Court of Penna. See Exhibit G of defendant's motion for summary judgment for the Commonwealth Court's opinion. The Board focused on the issue of unemployment compensation eligibility

and found that plaintiff's willful misconduct was a ground for discharge and, consequently, denial of unemployment compensation. The Board did not, however, address her claim that her conduct was mere pretext for defendant's discrimination. This, in reviewing the Board's decision, the Court also looked only at the issue of plaintiff's misconduct. (ExhibitG, p.3).

Furthermore, the cases on which defendant relies support plaintiff's right to litigate her Title VII claim. In Yurasko v Cheltenham Bank, No. 91-1592, 1993 WL 9023 (E.D. Pa. Jan. 12,1993) plaintiff's age discrimination claim was addressed by both the Penna. Unemployment Comp. Board of Review, as well as the Commonwealth Court of Penna. Consequently, the district court precluded plaintiff's action, specifically noting that it was "based upon the same issues and claims." Id at 1. Similarly, the court in Frederick v Am. Hardware Supply Co. 557 A 2D 779, 384 Pa. Super 72(Pa. Super. 1989) precluded appellant's claim on the finding

that the identical issue of wrongful discharge had already been adjudicated by the Unemployment Compensation Board of Review. On the other hand, the court in Edmundson v Borough of Kenneth Square, No.92-1848, 1993 WL 299655 (3d Cir, Aug. 10, 1993) held that because Edmundson never raised the First Amendment defense as an issue before the Unemployment Compensation Board of review, whose decision was affirmed by the Commonwealth Court, his § 1983 claim was not collaterally estopped. Although the Edmundson court found that Edmundson's defense was barred by res judicata, that does not apply to plaintiff's case, because plaintiff does not claim immunity for her conduct, but merely asserts that her conduct was not the acutal reason for her discharge.

Neither the unemployment compensation referee, the Commonwealth Court or the arbitrator were obligated to decide the merits of the plaintiff's Title VII claim. Clearly from the opinion of the arbitrator, as well as the opinion of the Commonwealth Court, no Determination was ever made on the plaintiff's claims of racial discrimination,

gender discrimination, or retaliation for having filed a Title VII claim. Furthermore, her allegation of disparate treatment was never addressed in either of these two forums.

Bell's Title VII claims before this Honarable Court of race discrimination, sex discrimination, disparate treatment, and retaliation for having filed a Title VII charge have not been examined by any tribunal. Thus, her opportunity to litigate these claims cannot be collaterally estopped.

For the aforementioned reasons, plaintiff requests that the Court deny defendant's motion for summary judgment and grant plaintiff a trial de novo.

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of Counsel.

Dated : August 17,1993

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

PHYLLIS BELL, Petitioner	:	
v	:	
UNEMPLOYMENT COMPENSATION BOARD OF REVIEW, Respondent	:	No. 1316 C.D.1992 Submitted: Oct.23, 1992

BEFORE: HONARABLE MADALINE PALLADINO, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE EMIL E. NARICK, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PALLADINO Filed: Feb.4,1993

Phyllis Bell (claimant) appeals from an order of the Unemployment Compensation Board of Review (Board) which affirmed the referee's denial of benefits to Claimant pursuant to Section 402(e) of the Pennsylvania Unemployment Compensation Law (Law)[1]. We affirm.

Claimant was employed as a staff pharmacist by the Pathmark Division of Supermarkets General Corporation (Employer). On October 30,1991, Claimant's supervisor instructed Claimant to

1.Act of December 5,1936,Secon Ex Sess,P.L.(1937) 2897, as amended,43 P.S. §802(e),which provides that an employee shall be ineligible for compensation in any week in which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work.

fill a prescription containing the letters,"WSB". Claimant did not know the meaning of "WSB". Claimant's supervisor told her that the abbreviation stood for "water soluble base" and suggested aquaphor as an appropriate substitute. Claimant was uncertain as to the acceptability of aquaphor as a substitute.

Claimant's supervisor then suggested that Claimant use polyethylene glycol or, in the alternative, than Claimant contact the prescribing physician regarding the acceptability of aquaphor. In response to these suggestions, Claimant advised her supervisor that she intented to leave the prescription for the part-time pharmacist to fill. Claimant's supervisor indicated to her that leaving the prescription for another pharmacist was not the proper way to handle the problem. In spite of the supervisor's instructions, Claimant failed to fill the prescription.

On October 31,1991, the Claimant's supervisor upon learning that Claimant did not fill the prescription on the previous day, called the prescribing physician. The physician advised the supervisor that aquaphor was acceptable.

Upon Claimant's arrival to work that day, the supervisor ordered Claimant to fill the prescription. Claimant refused. When Claimant's supervisor insisted, Claimant again refused and responded with abusive and profane language. As a result, Claimant's employment was terminated.

Claimant filed a claim for unemployment compensation benefits which was denied by the Bureau of Unemployment Compensation and Allowances(Bureau). The Bureau determined that Claimant was ineligible under Section 402(e) because she had been discharged from employment for willful misconduct. Claimant appealed the decision to a referee. Following a hearing, the referee denied benefits on the grounds articulated by the Bureau. Claimant then appealed to the Board. The Board affirmed the referee's denial of benefits.

On appeal to this Court, Claimant presents two issues[2]: 1. whether the Board's findings of fact were supported by substantial evidence; and 2. whether the Board erred in concluding Claimant's conduct constitued willful misconduct.[3]

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2. Claimant, in her reply brief, also requests that an omission in the record be corrected and that the record be supplemented. However, Claimant failed to follow the proper procedure of filling a petition with this Court pursuant to

As to the first issue, Claimant challanges several of the Board's finding of fact,asserting that these findings were not supported by substantial evidence. Substantial evidence has been defined as such relevant evidence which a reasonable mind might accept as adequate to support a conclusion. Mormak v Unemployment Compensation Board of Review, 135 Pa. Commonwealth Ct. 232, 579 A 2d. 1383 (1990). In determining whether there is substantial evidence to support the Board's findings, we must examine the testimony in the light most favorable to the prevailing party, giving that party the benefit of any inference which can be drawn logically and reasonably from the evidence.

Pa. R.A.P. No 1951(b). Accordingly, we must decide the issues of this case based upon the record before us and will disregard the addenda to Claimant's brief.

3.Our scope of review is limited to determining whether there has been a constitutional violation or an error of law and whether the necessary findings of fact are supported by substantial evidence. Phoenixville Area School District v Unemployment Compensation Board of Review,141 Pa. Commonwealth Ct. 555,596 A2d. 889 (1991).

Furthermore, it is well established that the Board is ultimate fact finder in unemployment compensation cases. Reice v Unemployment Compensation Board of Review, 134 Pa. Commonwealth Ct. 360,578 A. 2d 624 (1990). As such, it is within the Board's power to assess the credibility of the testimony presented and to resolve evidentiary conflicts. Hercules v Unemployment Compensation Board of Review, --Pa. Commonwealth Ct.--604 A 2d 1159 (1992).

In a hearing before the referee, Claimant's supervisor testified regarding conversations he had with Claimant and the Claimant's use of abusive and profane language in addressing him. This testimony was corroborated by that of another employee. It as the Board's finding that Employer's witnesses were credible, while rejecting the testimony of Claimant. At the same time, many of the Board's findings of fact were based on Claimant's own admissions. The record reflects that Claimant herself admitted that she did not know the meaning of "WSB"[4], that her supervisor instructed her to contact the prescribing physician, that she did not take steps to fill the prescription,

and that the patient would not have been injured if the Claimant had filled the prescription in accordance with her supervisor's instructions.[5] Because the challanged findings of fact are based upon the credible testimony of Employer and upon Claimant's own admissions, we find these findings of fact to be supported by substantial evidence. Accordingly, they must be accepted as conclusive on appeal. Reice.

We next turn to whether the Board erred in determining that Claimant's conduct, in refusing to obey her supervisor's order and in addressing him with abusive and profane language, constitued willful misconduct under the Law. Although the Law does not expressly define the term, this Court as interpreted "willful misconduct" to include conduct that represents a wanton and willful disregard of an employer's interests, a deliberate violation of an employer's rules, a disregard of the standards of behavior which an employer can rightfully expect of an employee,

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4. As to Claimant's argument that this finding wrongly implies diminished level of professional competence, we dismiss it as irrelevant because Claimant was not discharged for poor performance.

or negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of either an employer's interests or an employee's duties and obligations. White v Unemployment Compensation Board of Review, 69 Pa. Commonwealth Ct. 196, 450 A 2d 770 (1982). Whether conduct rises to the level of willful misconduct is a question of law subject to our review. Lee Hospital v UNemployment Compensation Board of Review, 139 Pa. Commonwealth Ct. 28, 589 A2d. 297(1991).

An employee's refusal to comply with a directive or request of a supervisor may constitute willful misconduct unless the employee establishes good cause for his refusal. Heins v Unemployment Compensation Board of Review, 111 Pa. Commonwealth Ct. 604,534 A2d 592 (1987). In other words, the reasonableness of the employer's request must be balance with the reasonableness of the employee's refusal.Waltz v Unemployment

5.We also reject Claimant's argument that this finding of face was not a necessary one. We agree with the Board that the finding was necessary in demonstrating that Claimant was not asked to do something which would have harmed the patient.

Compensation Board of Review, 111 Pa. Commonwealth Ct. 54, 533 A.2d 199 (1987). While the burden of proving willful misconduct rests with employer, the burden of proving good cause is on the employee. New v Unemployment Compensation Board of Review, 126 Pa. Commonwealth Ct. 52,558 A.2d 602 (1989). appeal denied, 590 A. 2d 298 (1991).

The record shows that Claimant was asked to fill a prescription, but that she failed to follow her supervisor's instructions. Based upon discussions which occurred between Claimant and her supervisor regarding the suitability of polyethylene glycol and the supervisor's subsequent telephone conversation with the prescribing physician which confirmed the acceptability of aquaphor, we conclude that Employer's request to fill the prescription was a reasonable one.

Claimant, in attempting to demonstrate good cause, maintains that because her supervisor never informed her of this telephone call to the prescribing physician, she had not way of knowing that the physican approved the use of aquaphor. By failing to provide her with this information, Claimant argues that her supervi-

sor in effect was asking her to commit an act prohibited by Section 390-5 of the Pharmacy Act.[6] This Court has previously held, however, that an employee, where feasible, must notify his employer of the reason for noncompliance, unless the reason for noncompliance is self-evident or the employer is independently aware of the circumstances warranting it. Klapec Trucking Co. v Unemployment Compensation Board of Review, 95 Pa. Commonwealth Ct. 86, 503 A2d 1122 (1986).

Although Claimant may have had reasons for refusing to fill the prescription with aquaphor, whe at no time voice those reasons to her supervisor. Instead, she became angry and belligerent, using abusive and offensive language. This language certainly di not convey Claimant's reasons for noncompliance, and she could not have reasonalby expected that it would. Under these circumstances, we conclude that this case presents a situation where the employee was obliged to inform the employer of her reasons for noncom-

6.Act of September 27,1961,P.L. 1700 as amended, 63 P.S. §390-5. Section 390-5(a) (8) prohibits pharmacists from making unauthorized substitutions. Section 390-5(a)(9)(vii) prohibits the misbranding or adulteration of any drug.

pliance and that her failure to do so negates the the existance of good cause.

Further, this Court has held that even a single instance of vulgarity addressed to and unprovoked by a supervisor may support a finding of willful misconduct. Viglino v Unemployment Compensation Board of Review, 105 Pa. Commonwealth Ct. 616,525 A.2d 450 (1987). Therefore, we conclude that Claimant's unprovoked use of profanity in addressing her supervisor constitued willfull misconduct under the Law.

Having determined that the Boards's findings of fact were supported by substantial evidence and that the Board did not err in its determination that Claimant's actions constituted willful misconduct, we affirm the order of the Board.

MADALINE PALLADINO, JUDGE

AGREEMENT

SUPERMARKETS GENERAL CORPORATION

and

UNITED PHARMACIST GUILD

UFCW LOCAL 100R-AFL-CIO & CLC

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ARTICLE IX GRIEVANCES AND ARBITRATION

4.

(c) The arbitrator selected shall render his decision in writing within thirty(30) days of the closing of the hearing before him.

5. In the event that the discharge is found not to be justified, the employee shall be reinstated and awarded back pay, or any part thereof, and restoration of privil-eges and senority.

ARTICLE XVIII-MANAGEMENT RIGHTS

3.The duties and responsibilites of the pharmacist in connection with his services to the public...

j. Decisions concerning ethical or pro-fessional aspects of pharmacy shall remain soley within the judgement of the pharmacist

on duty as it refers to immediate decisions in connection with the job.

"PHARMACY ACT"

Act of September 27,1961,P.L. 1700,
No. 699, as amended
December 20,1985, P.L. 433,
No.111,63P.S. §390-et seq.

Relating to the regulation of the practice of pharmacy, including the sale,use and distribution of drugs and devices at retail;and amending, revising consolidating and repealing certain laws relating thereto.

THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA HEREBY ENACTS AS FOLLOWS:

Section 5. Refusal to Grant, Revocation and suspension.--(a) The board shall have the power to refuse, revoke or suspend the license of any pharmacist upon proof satisfactory to it that the pharmacist:

(12)Is guilty of incompetence, gross negligence or other malpractice, or the departure from, or failure to conform to, the standards of acceptable and prevailing pharmacy practice, IN WHICH CASE ACTUAL INJURY NEED NOT BE ESTABLISHED.